

South Dakota

I. Background

The South Dakota Division of Child Support Enforcement is within the South Dakota Department of Social Services. The child support program is state-administered, with eight field offices. According to unaudited data, at the end of federal fiscal year 2006, the South Dakota child support program had 32,393 open IV-D cases¹ and 109 full-time equivalent staff.² That year South Dakota scored above the national average in all five of the five federal performance measures (paternity, support order establishment, current collections, arrearage collections, and cost effectiveness).

South Dakota has long had an administrative process for income withholding. Its use of administrative procedures has changed over time. At one time, the agency had authority to establish administrative orders using administrative hearing officers. The process was never held unconstitutional. However, according to the agency representative, because of some strongly worded dissents in some appellate cases, the agency moved to a quasi-administrative process for child support establishment in the late 1980's. Under the South Dakota quasi-administrative process, the court is always the final arbiter. A child support referee, who is an attorney appointed by the state Supreme Court, can only make a recommended order; the court is the entity that issues the final order.

The statutory authority for the South Dakota quasi-administrative process is S.D. Codified Laws §§ 25-7A-5 *et seq.*

II. Due Process Summary

Under the South Dakota quasi-administrative processes, a child support referee can hear challenges to support, but not contests to paternity. If no hearing is requested, an application for a default order goes directly to the circuit court for entry of the default order; the referee is not involved.

In a paternity case with a presumed father or in a support establishment case, the child support agency serves the presumed father/noncustodial parent with a Notice of Support Debt. If there is no timely objection to the administrative Notice, the agency files with the clerk of the circuit court the Notice of Support Debt, proof of service, and an application for a default order for support. The court must enter an order for support in accordance with the child support guidelines. The court may also enter an order for health insurance, genetic testing costs, adjudicating the paternity of the child or establishing custody of the child.

If the presumed father or noncustodial parent requests a hearing on support, the agency files the Notice of Support Debt, proof of service, and the parent's response in the office

* Interview with David Braun, Senior Staff Attorney, Division of Child Support Enforcement.

¹ Table 4, Statistical Program Status, OCSE FY 2006 Preliminary Data Report.

² State Box Score, OCSE FY 2006 Preliminary Data Report.

of the clerk of circuit court. The hearing is before a child support referee. Both parents are notified of the hearing date by first class mail. The hearing can be in person or by telephone. Parties have the right to present evidence and to be represented by an attorney. Based on the evidence, the referee makes a report to the court, recommending a proposed support amount. The report includes findings and conclusions of law.

The referee files the report with the court and serves the parties with copies, by first class mail. The parties have 10 days from the date of service of the report in which to file objections. If there is no objection, at the expiration of the 10 days, the circuit court may without further notice enter its order. If there is an objection, the circuit court schedules a hearing on the report. The hearing is on the record established before the referee. The circuit court may adopt the referee's report, may modify it, or may remand it with instructions or for further hearing. The agency serves the parents with the court's order by certified mail, return receipt requested.

The South Dakota quasi-administrative process does not use an administrative law judge or hearing officer, and is not subject to the South Dakota Administrative Procedure Act. All orders must be signed by a judge.

Contested paternity cases are always heard in circuit court.

III. Establishment of Parentage

The quasi-administrative process can be used in uncontested paternity cases. If there is a presumption of parentage, the agency serves the presumed father with a Notice of Support Debt. Service on the presumed father is usually by certified mail; service can also be by personal service. The Notice advises the presumed father of the proposed support obligation, based on income data available to the agency. The Notice also includes the following statements:

- If the parent does not request a hearing within 10 days from the day of service, the agency will request that the court enter an order establishing the amount of child support for which the parent is responsible and may request that the court enter an order for health insurance coverage, genetic testing costs, and an order adjudicating paternity and custody of the child;
- The parent may, within 10 days from the date of service, submit a written response to the notice objecting to all or any part of the notice and requesting a hearing;
- An order establishing the payment obligation of the parent is subject to collection action;
- An order for support is filed with the appropriate clerk of courts and is a lien as provided by law;
- If the parent has any questions, he or she may telephone or visit the nearest department office or consult an attorney; and

- The parent has an obligation to report any change of address or employment to the agency.

If there is no objection to the administrative Notice of Support Debt, the agency files with the clerk of the circuit court the Notice of Support Debt, proof of service, and an application for an order for support. The court must enter an order for support in accordance with the child support guidelines. The court may also enter an order for health insurance, genetic testing costs, adjudicating the paternity of the child or establishing custody of the child. A party may seek to set aside the default order in the same manner as allowed for any other order or judgment – through a Rule 60(b) motion based on a mistake, newly discovered evidence, fraud, the judgment is void, the judgment has satisfied or discharged, or any other reason justifying relief. The motion must be made within one year after the order or judgment was made.

If the presumed father contests paternity, he must bring an independent action in circuit court in order to establish that he is not the father of the child. The establishment of the support obligation is not stayed pending the paternity action begun by the presumed father. As described earlier, the agency files the Notice of Support Debt, proof of service, and the presumed father's response with the clerk of the circuit court. There is a hearing before a referee to determine the support amount. The referee makes a report, which is served on the parties and filed with the circuit court. If a party files a timely objection to the referee's report, the circuit court must schedule a hearing. The hearing is solely on the record established before the referee. The agency serves the court's order by certified mail, return receipt requested, to both parties.

According to the agency representative, most paternity cases do not result in a challenge.

Where there is no presumption of parentage, the agency attempts to reach a stipulation and agreement with the alleged father on the issues of paternity and support, which is then approved by court order and judgment. If there is no agreement, the agency refers the case to one of its contract prosecutors to commence a formal paternity action against the alleged father by way of Summons and Complaint. Generally, however, if the alleged father questions paternity, the agency coordinates genetic testing, which will either exclude the alleged father or establish a probability of paternity (which may create a legal presumption).

IV. Support Establishment

In an establishment case, the agency uses income information from its various database interfaces and other sources to calculate the guideline support obligation. If the agency knows that the noncustodial parent is unemployed, but there is no reason to believe that the parent has a physical or mental disability, the agency imputes full employment at the state minimum wage to the parent. If there is no unemployment or income data, the agency imputes income based on Department of Labor statistics on the average wage of a South Dakota worker.

The agency prepares a Notice of Support Debt and serves it on the noncustodial parent, usually by certified mail; personal service can also be used. The Notice advises the noncustodial parent of the proposed support obligation, based on income data available to the agency. The Notice also includes the following statements:

- If the parent does not request a hearing within 10 days from the day of service, the agency will request that the court enter an order establishing the amount of child support for which the parent is responsible and may request that the court enter an order for health insurance coverage, genetic testing costs, and an order adjudicating paternity and custody of the child;
- The noncustodial parent may, within 10 days from the date of service, submit a written response to the notice objecting to all or any part of the notice and requesting a hearing;
- An order establishing the payment obligation of the parent is subject to collection action;
- An order for support is filed with the appropriate clerk of courts and is a lien as provided by law;
- If the parent has any questions, he or she may telephone or visit the nearest department office or consult an attorney; and
- The parent has an obligation to report any change of address or employment to the agency.

Current law does not require service on the custodial parent.³

If there is no timely objection to the administrative Notice of Support Debt, the agency files with the clerk of the circuit court the Notice of Support Debt, proof of service, and an application for an order for support. The court must enter an order for support in accordance with the child support guidelines. The court may also enter an order for health insurance, genetic testing costs, adjudicating the paternity of the child or establishing custody of the child. A party may seek to set aside the default order in the same manner as allowed for any other order or judgment – through a Rule 60(b) motion based on a mistake, newly discovered evidence, fraud, the judgment is void, the judgment has satisfied or discharged, or any other reason justifying relief. The motion must be made within one year after the order or judgment was made

If the noncustodial parent responds to the Notice of Support Debt by requesting a hearing, the agency files the Notice of Support Debt, proof of service, and the parent's response in the office of the clerk of circuit court. The hearing is before a child support referee. Both parents are notified of the hearing date by first class mail. The hearing can be in person or by telephone. Parties have the right to present evidence and to be represented by an attorney. Based on the evidence, the referee makes a report to the

³ According to the agency representative, South Dakota is contemplating amending its statutes to require or allow service of process upon the custodial parent so that he or she may also request a hearing in an establishment proceeding. For example, the custodial parent may disagree with the agency's calculation of support. Under present statutes, the custodial parent cannot object or request a hearing before a referee to resolve that issue.

court, recommending a proposed support amount. The report includes findings and conclusions of law. The referee can recommend a deviation from the guideline amount.

The referee files the report with the court and serves the parties with copies, by first class mail. The parties have 10 days from the date of service of the report in which to file objections. If there is no objection, at the expiration of the 10 days, the circuit court may without further notice enter its order. If there is an objection, the circuit court schedules a hearing on the report. The hearing is on the record established before the referee. The circuit court may adopt the referee's report, may modify it, or may remand it with instructions or for further hearing.

The agency serves the parents with the court's order by certified mail, return receipt requested.

V. Review and Adjustment/Modification

In a non-TANF case, if a party files a petition for modification, the agency must file the petition in the office of the clerk of the circuit court where the original order for support is filed. The hearing is before a referee after notice of the date to both parties by first class mail. The hearing can be in person or by telephone. Parties have the right to present evidence and to be represented by an attorney. Based on the evidence presented, the referee makes a report to the court, recommending the amount of the monthly support obligation of the parent or modifying the terms regarding health insurance coverage.

The referee files the report with the court and mails a copy to the parties and the agency. Any party has 10 days from the date of service of the report in which to file objections. If no objection is filed, the circuit court, without further notice, may enter its order. If a party files an objection, the circuit court must schedule a hearing. The hearing is solely on the record established before the referee. The agency serves the court's order by certified mail, return receipt requested, to both parties.

VI. Enforcement

The South Dakota child support agency has a full range of administrative enforcement remedies, e.g., income withholding, license suspension, credit bureau reporting. With the exception of contempt, which requires a court hearing, the agency can use the quasi-administrative child support process for enforcement actions. The type of notice and service depends upon the enforcement sought. Most enforcement measures are triggered by mailing notice to the noncustodial parent by regular mail; some, such as contempt of court, require personal service. Any challenge to enforcement is heard by a referee. Based on the evidence presented, the referee issues a report. The referee files the report with the court and mails a copy to the parties and the agency. The parties may appeal the referee's decision to the circuit court. If there is no objection, the circuit court may enter its order without further notice.

VII. Statistics

Timeframes

The agency representative did not have timeframe information regarding the percentage of support orders established within six months and within 12 months of service.

Contest to Administrative Notice

The agency representative estimated that no more than 33% of the establishment cases request a hearing before a referee. Of those cases heard by a referee, the representative estimated that probably 25% appeal to the circuit court.

VIII. Strengths/Limitations

The agency representative noted the following strengths of South Dakota's quasi-administrative process:

- It reduces the need for court time.
- It saves parties money because they do not need to hire lawyers. The agency forms are self-explanatory and the process is designed to be "user-friendly."
- It is a quicker process than one in which every case has to go before the court for resolution.
- It meets the federal timeframes. Court dates are difficult to obtain in high population areas. Referees have to meet expedited time frames in order to get paid through their cooperative agreement with the agency; they therefore ensure that cases are heard promptly.

The agency representative did not note any limitations to the agency's quasi-administrative process.

IX. Recommendations/Best Practices

To avoid any constitutional argument about separation of powers, establish a quasi-administrative process in which the court issues the final order.

Make the process user friendly.

Selected South Dakota Statutes
S.D. Codified Laws

25-7A-5. Notice of support debt--Service on parent--Contents of notice. The secretary of social services may initiate an action for support by issuing a notice of a support debt, which shall be served without summons or other pleadings on the alleged responsible parent in the manner provided for service of a summons in a civil action or by certified mail, return receipt requested. The notice, whether based on subrogation power of attorney, assignment of a support obligation established by a court, administrative order or judgment or based on the furnishing of assistance by the Department of Social Services for any dependent child or spouse, or based on the obligation fixed by chapter 25-7, or support due to an obligee or another state who has applied for support enforcement services, shall contain the following statements:

- (1) The name of the dependent child or spouse for whom support is owed;
- (2) The monthly support for which the parent is responsible, including a statement of the debt accrued and accruing, and the monthly payment to be made on the state debt accrued, or due to an obligee or another state who has applied for support enforcement services, as established by:
 - (a) Subrogation to or assignment of a court or administrative order, judgment or decree establishing a set or determinable amount of child or spousal support; or
 - (b) Payment of assistance by the department for a dependent child or spouse where there is no court or administrative order, judgment or decree;
- (3) A statement that if the parent does not request a hearing within ten days from the day of service, the secretary:
 - (a) Will request the court enter an order establishing the amount of child support, accrued and accruing, which the parent is responsible for and the amount of the total monthly payment due on the accrued debt to the state, or to an obligee or another state who has applied for support enforcement services, and on the monthly support obligation;
 - (b) May request that the court enter an order for health insurance coverage;
 - (c) May request that the court enter an order for genetic testing costs; and
 - (d) May request that the court enter an order adjudicating paternity and custody of the child;
- (4) A statement that the parent served with a notice of support debt may, within ten days of the day of service of the notice of support debt, submit a written response to the notice objecting to all or any part of the notice and requesting a hearing;
- (5) A statement that an order entered under subdivision (3) of this section, establishing the payment obligation of the parent is subject to collection action, including an order for income withholding under this chapter, levy and execution under the laws of this state or any other collection actions authorized by law;

- (6) A reference to this chapter;
- (7) A statement that an order for support entered under this chapter is filed with the appropriate clerk of courts and is a lien as provided by law;
- (8) A statement that if the parent has any questions he may telephone or visit the nearest department office or consult an attorney;
- (9) A statement that the parent has an obligation to report any change of address or employment to the department; and
- (10) Any other information the secretary finds appropriate.

Source: SL 1982, ch 196, § 5; SL 1986, ch 218, § 6; SL 1989, ch 175, § 3; SL 1995, ch 144, § 1; SL 1997, ch 155, § 6; SL 2001, ch 134, § 1.

25-7A-6. Hearing requested by parent--Hearing before referee--Referee's report--Filing objections to report--Hearing on report--Order of court--Service of order by mail--Objection to modification without hearing. If a parent served with a notice of support debt under § 25-7A-5 makes a timely request for a hearing, the secretary of social services shall file the notice of support debt, proof of service thereof, and response thereto in the office of the clerk of the circuit court in the county of residence of that parent. The matter shall be set for hearing before a referee who is a member in good standing of the State Bar Association and is appointed by the court, pursuant to statute, and after due notice to all parties by first class mail. The referee shall make a report to the court, recommending the amount of the debt due to the state, if any, and the monthly support obligation of the parent and the arrearage debt due to the obligee or another state who has applied for support enforcement services, or for health insurance coverage or genetic testing costs.

The referee shall file the report with the court and cause copies thereof to be served by mailing to the parties and the secretary. Any party shall have ten days from the date of service of the report in which to file objections to the report. If a party files an objection, the other party shall have an additional five days from the date of service of the objections to file additional objections. If no objection is filed, the circuit court may thereafter, and without further notice, enter its order. If any objection is filed, the circuit court shall fix a date for hearing on the report, the hearing to be solely on the record established before the referee. The circuit court may thereafter adopt the referee's report, or may modify it, or may reject and remand it with instructions or for further hearing. The secretary shall serve the parent the court's order by certified mail, return receipt requested, at the parent's last known address, and shall file proof of service.

If the circuit court's order modifies the referee's report and no hearing was held before the court before entry of its order, any party has ten days from the date of service of the order in which to file an objection to that modification. If an objection is filed, the circuit

court shall fix a date for hearing on the objection and after the hearing shall enter its order. The secretary shall serve the order by certified mail, return receipt requested, at the parent's last known address, and shall file proof of service.

Source: SL 1982, ch 196, § 6; SL 1986, ch 218, § 7; SL 1989, ch 175, § 4; SL 1991, ch 213, § 1; SL 1995, ch 144, § 2; SL 2005, ch 134, § 7.

25-7A-7. Support order filed by secretary--Order entered by court--Service. If a parent is served with a notice of support debt under § 25-7A-5 and does not request a hearing within ten days, the secretary of social services shall file, in the office of the appropriate clerk of the circuit court, the notice of support debt, proof of service thereof, and an application for an order for support. The court shall enter an order for support in accordance with the child support guidelines set by statute, establishing the amount of child support, accrued and accruing, for which the parent is responsible and the amount of the total monthly payment due on the accrued debt to the state, or to an obligee or another state who has applied for support enforcement services, and on the monthly support obligation. The court may also enter an order for health insurance coverage, genetic testing costs, adjudicating the paternity of the child, or establishing custody of the child. The secretary shall serve the parent an order by certified mail, return receipt requested, at the parent's last known address, and shall file proof of service.

Source: SL 1982, ch 196, § 7; SL 1986, ch 218, § 8; SL 1989, ch 175, § 5; SL 1995, ch 144, § 3; SL 2001, ch 134, § 2.

25-7A-8. Circuit court action to contest paternity or custody. If a person served with a notice of support debt under § 25-7A-5 contests paternity or custody of the child, and the person is presumed to be the parent of the child in accordance with the provisions of chapter 25-8, the secretary shall inform the responding party that an action must be commenced in circuit court in accordance with chapter 25-8 in order to establish that the person is not the father of the child or to establish custody. The notice of support debt, proof of service, and the response shall be filed for the purpose of establishing the support obligation as provided in § 25-7A-6. The establishment and enforcement of the obligation may not be stayed pending the action for paternity or custody determination commenced by the respondent.

Source: SL 1982, ch 196, § 8; SL 1986, ch 218, § 9; SL 1989, ch 175, § 6; SL 1994, ch 204, § 12; SL 2001, ch 134, § 3.

25-7A-10.1. Filing of action involving previous support order. If the proceedings for enforcement of child support involve amendment of a previous support order as fixed by a decree of divorce, judgment in a paternity action or prior enforcement proceedings which have been held in any court in this state, the action shall be filed in the office of the clerk of the circuit court for the county in which such previous order was entered.

Source: SL 1989, ch 175, § 10.

25-7A-22. Modification of child support--Hearing before referee--Referee's report--Objections--Service of court order--Objection to modification without hearing. If the support order was entered in this state and this state maintains continuing exclusive jurisdiction over the support order in accordance with chapter 25-9B, or if the support order was registered in this state and the requirements of § 25-9B-611 or 25-9B-613 are satisfied, an obligor, an obligee, or the assignee may file a petition, on forms prescribed by the department, to increase or decrease child support. For any support order entered or modified after July 1, 1997:

(1) The order may be modified upon showing a substantial change in circumstances if the petition is filed within three years of the date of the order; or

(2) The order may be modified without showing any change in circumstances if the petition is filed after three years of the date of the order.

If a petition is filed, the secretary of social services shall file the petition in the office of the clerk of the circuit court where the original order for support is filed. Any response shall also be provided to the petitioning party. The matter shall be set for hearing before a referee who is a member in good standing of the State Bar Association and is appointed by the court, pursuant to statute, and after due notice to all parties by first class mail. The referee shall make a report to the court, recommending the amount of the monthly support obligation of the parent or for health insurance coverage.

The referee shall file the report with the court and cause copies thereof to be served by mailing to the parties and the secretary. Any party shall have ten days from the date of service of the report in which to file objections to the report. If a party files an objection, the other party shall have an additional five days from the date of service of the objections to file additional objections. If no objection is filed, the circuit court may thereafter, and without further notice, enter its order. If any objection is filed, the circuit court shall fix a date for hearing on the report, the hearing to be solely on the record established before the referee. The circuit court may thereafter adopt the referee's report, or may modify it, or may reject and remand it with instructions or for further hearing. The secretary shall serve the parent the court's order by certified mail, return receipt requested, at the parent's last known address, and shall file proof of service.

If the circuit court's order modifies the referee's report and no hearing was held before the circuit court before entry of its order, any party has ten days from the date of service of the order in which to file an objection to that modification. If an objection is filed, the circuit court shall fix a date for hearing on the objection and after the hearing shall enter its order. The secretary shall serve the order by certified mail, return receipt requested, at the parent's last known address, and shall file proof of service.

Source: SL 1986, ch 218, § 21; SL 1987, ch 194; SL 1989, ch 175, § 8; SL 1991, ch 213, § 2; SL 1995, ch 144, § 4; SL 1997, ch 155, § 7; SL 2005, ch 134, § 8.

25-7A-56.3. Administrative authority of Title IV-D agency in paternity and support actions. In actions involving either the establishment of paternity, or the establishment, modification, or enforcement of a support order, any Title IV-D agency shall have the administrative authority to perform the following functions without the necessity of obtaining an order from any other judicial or administrative entity:

- (1) To order genetic testing for purposes of paternity establishment;
- (2) To administratively subpoena any financial or other information needed by the department to establish, modify, or enforce a child support order.

Any person or entity who intentionally fails to respond to a subpoena issued by the department pursuant to this section commits a petty offense.

Source: SL 1997, ch 155, § 22.